No. .....

In The

Supreme Court of the United States

October Term, 1986

GEORGE F. METZ and INGRID METZ,

Petitioners,

V.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

The questions presented for review are:

(a) Whether an action for invasion of privacy can be maintained against the United States under the Federal Tort Claims Act and

(b) Whether an action for intentional infliction of emotional distress can be maintained against the United States under the Federal Tort Claims Act.

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The Petitioners, George F. Metz and Ingrid Metz, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on May 13, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit and the United States District Court for the Southern District of Georgia appear in the appendix hereto. See also *Metz v. United States*, 788 F.2d 1528 (11th Cir., 1986).

———o———

JURISDICTION

The judgment which is the subject of the petition for review was entered in the United States Court of Appeals for the Eleventh Circuit on May 13, 1986 and this petition has been filed within 90 days thereof. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 USC § 1254(1).

———o———

APPLICABLE STATUTES

The statutes which this case involves are:

28 USC § 1346(b)

28 USC §§ 2671, 2674, et seq.

28 USC § 2680

The pertinent text of these statutes is set forth in the Appendix hereto.

STATEMENT OF THE CASE

Petitioners seek review of the May 13, 1986 decision of the United States Court of Appeals for the Eleventh Circuit holding, in pertinent part, that petitioners' claims against the United States for invasion of privacy and intentional infliction of emotional distress are barred by the doctrine of sovereign immunity. In the court of first instance (United States District Court for the Southern District of Georgia), Petitioners sued the United States pursuant to the Federal Tort Claims Act, invoking Federal jurisdiction under the provisions of 28 USC § 1346(b).

The United States Court of Appeals for the Eleventh Circuit declined to follow *Black v. Sheraton Corporation of America*, 564 F. 2d 532 (D.C. Cir., 1976), which held that a cause of action for invasion of privacy can be maintained against the United States and is not barred by the doctrine of sovereign immunity. The United States Court of Appeals for the Eleventh Circuit also declined to follow *Gross v. United States*, 676 F. 2d 295 (8th Cir., 1982) which held that a claim for intentional infliction of emotional distress can be maintained against the United States and is not barred by the doctrine of sovereign immunity.

Immediately upon his arrival at a Marine Corps facility in Columbia, South Carolina, on August 4, 1982, the petitioner, George F. Metz, a major in the United States Marine Corps Reserve, was placed under a warrantless arrest by Marine Corps personnel when he attempted to report for reserve duty. Mr. Metz's truck and personal effects were searched and he was held under "house arrest" throughout most of the day, during which time he was constantly "shadowed".

Late that afternoon, Mr. Metz was locked in a maximum security mental hospital for psychiatric evaluation. Upon admission, he was searched and deprived of all personal affects. He was placed in a glass enclosure where all of his movements and activities, including the performance of basic bodily functions, were monitored. For two days thereafter, Mr. Metz remained under constant observation, during which time he was forced to mingle with mentally ill people and subjected to lengthy and probing interrogations and examinations by a team of four Army psychiatrists.

On August 6, 1982, one of the psychiatrists reported, with reference to Mr. Metz, that:

> "There were no signs of any psychosis or depression and no signs of the patient being harmful to himself or others, due to a mental illness or defect."

Mr. Metz then returned to and satisfactorily completed his Marine Reserve duty.

When these events occurred, the petitioner, George F. Metz, was an employee of the Federal Law Enforcement Training Center (abbreviated as the FLETC), Glynco, Georgia, where he was assigned to "drivers' specialties," as a high-speed and defensive driving instructor. He had, at that time, satisfactorily completed approximately 13 years of continuous Federal employment. FLETC officials had previously granted annual leave to Mr. Metz so that he could attend his Marine Reserve training. With the full knowledge and consent of his superiors, George Metz departed the FLETC on the afternoon of August 3, 1982, to Columbia, South Carolina for that purpose.

Mr. Metz, a person who is vocal by nature, had recently verbalized objections and dissatisfaction with his annual performance evaluation for 1981-1982, which rated him "excellent" overall, as opposed to the "outstanding" (highest rating possible) he had received the year before. In so doing, Mr. Metz made uncomplimentary remarks about several FLETC supervisory personnel which Treasury and FLETC officials later contended were threats. Mr. Metz contends that he did not threaten or intend to threaten anyone.

Earlier on August 3, 1982, George Metz had been summoned to and did attend a meeting with several supervisory personnel at the FLETC. Beforehand, he was told the meeting was just going to be a "good old boy chat" and that he would not need to be accompanied by a lawyer or union representative.

During the meeting, Mr. Metz was encouraged to and did, in fact, freely and candidly discuss and express his job frustrations and complaints. However, according to the Assistant Director of the FLETC in charge of Faculty Management, who was in attendance at the meeting, Mr. Metz did not threaten anyone or acknowledge that he had previously threatened anyone and nothing occurred in the meeting which was a violation of FLETC rules, procedures or policies. Afterwards, Mr. Metz had a good feeling about what had happened at the meeting and his immediate supervisor, who also attended the meeting, told Mr. Metz that he had comported himself well and that he expected Mr. Metz's work-related problems would soon be resolved.

Nevertheless, during the night of August 3 and the early morning hours of August 4, 1982, Treasury and FLETC officials contacted Headquarters, Marine Corps, Washington, D.C., regarding the petitioner, George Metz. The Marine Corps was informed of the time and place Major Metz would be reporting for reserve duty the next day; that Metz had threatened senior Treasury officials; that he had threatened to commit suicide; that he had checked out a weapon under unusual circumstances and that he should be considered armed and dangerous. In fact, none of this information was true or accurate.

The Marines were exhorted by FLETC and Department of Treasury officials to "detain" Major Metz when he reported for active duty and hold him for a psychological evaluation. The Marine Corps was also incorrectly advised that a Federal arrest warrant had been issued and that the United States Marshals would take George Metz into custody shortly after the requested detainment, if not before. According to Metz's commanding officer, Marine Reserve Colonel Clynch Newsome, Jr., U. S. Treasury officials requested that Mr. Metz be "restrained" at the Marine Corps facility where he was to report for reserve duty and that the Marine Corps terminate Mr. Metz's active duty status and send him back to Brunswick, Georgia.

During the early part of the evening of August 3, 1982, David W. McKinley, the acting Director at the FLETC and A. George Graves, Branch Chief of Drivers' Specialties at FLETC, went to the Metz residence in Brunswick, Georgia. Before going, however, they recruited the assistance of the petitioners' priest, Father Raymond Carr. They told Father Carr that George Metz was homicidal, suicidal, armed and dangerous.

Even though McKinley and Graves knew Mr. Metz was in Columbia, South Carolina, or enroute thereto and their real reason for going to the petitioners' home was to prevail upon the petitioner, Ingrid Metz, to reveal precisely where her husband would be staying in Columbia that night, they told Father Carr that George Metz was or might be barricaded in the Metz home. McKinley and Graves used words such as "killing" and "blowing the place up" when they talked to Father Carr.

Before attempting entry into the Metz home, McKinley and Graves went upon petitioners' property and surreptitiously checked out the house, apparently to verify that George Metz was not at home. In fact, the petitioner, Ingrid Metz, and the two young Metz children, were alone in the house.

McKinley and Graves used Father Carr to gain entry to the house, after which they told Mrs. Metz her husband was suicidal, homicidal, armed and dangerous; that he had threatened to kill people at the Training Center; that he had threatened to kill himself and that he was going to be arrested when he reported for Marine Reserve duty the next morning and held for psychological evaluation and testing. These FLETC officials also told Mrs. Metz that a warrant for her husband's arrest had been issued, charging him with making terroristic threats. They wanted to know where Mr. Metz was staying and they implored Mrs. Metz not to tell her husband what was happening.

Had McKinley and Graves not been accompanied by Father Carr and had Mrs. Metz been apprised beforehand of the real purpose for the visit, McKinley and Graves would not have been admitted to the Metz home.

When Mr. Metz returned to Brunswick, Georgia, upon completion of his Marine reserve duty, he was placed on involuntary leave from employment at FLETC and compelled to submit to a psychological fitness for duty examination. When he passed this test, removal proceedings were immediately initiated against him which led to his removal from Federal employment on November 22, 1982. However, pursuant to the January 2, 1986, decision of the United States Court of Appeals for the Federal Circuit, which held that he did not threaten or attempt to threaten anyone and exonerated him from all wrongdoing, petitioner, George Metz, was returned to Federal employment. See *Metz v. Department of Treasury,* 780 F. 2d 1001 (Fed. Cir., 1986).

In another action, the District Court and the United States Court of Appeals for the Eleventh Circuit have held that the petitioners could not maintain a Bivens action against the individuals involved in the events outlined above. See *Metz v. McKinley,* 583 F. Supp. 683 (S.D. Ga., 1984), affirmed at 747 F. 2d 709 (11th Cir., 1984).

In the instant case, each petitioner asserted in separate counts in the amended and recast complaint, which superseded the original complaint, claims for invasion of privacy and intentional infliction of emotional distress. In the decision sought to be reviewed, the United States Court of Appeals for the Eleventh Circuit held that these claims are barred by 28 USC § 2680(h).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

Insofar as petitioners' claims for invasion of privacy are concerned, the subject decision of the United States Court of Appeals for the Eleventh Circuit is in conflict with the decisions of the United States Court of Appeals for the D.C. Circuit and the Second Circuit, both of which have held that suits against the government for invasion of privacy are not barred by 28 USC § 2680(h). See *Black v. Sheraton Corporation of America,* supra, and *Birnbaum v. United States,* 588 F. 2d 319 (2d Cir., 1978). The decision of the United States Court of Appeals for the Eleventh Circuit regarding petitioners' claims for intentional infliction of emotional distress is in conflict with a decision of the Eighth Circuit which held that such claims are maintainable against the United States and are not barred by the doctrine of sovereign immunity. *Gross v. United States,* supra. Thus, the considerations covering review on certiorari set forth in Rule 17(1)(a), Rules of the Supreme Court of the United States, are involved here.

It is noteworthy that in 1974, 28 USC § 2680(h) was amended. See Acts of March 16, 1974, Pub. L. 93-253, § 2, 88 Stat. 50. Had Congress intended that claims for invasion of privacy and intentional infliction of emotional distress not be maintainable under the Federal Tort Claims Act, it could have clearly expressed that intent in the aforesaid amendment. It did not do so and, particularly noteworthy are the following observations contained in the Senate Committee Report accompanying the amendment, which were quoted in *Black v. Sheraton Corporation of America,* to-wit:

> " 'The Committee realizes that under the Federal Tort Claims Act, government tort liability for intentional conduct is unclear. For example, certain intentional torts such as trespass and invasion of privacy are not always excluded from Federal Tort Claims Act coverage. Obviously, it is the intent of the Committee that these borderline cases under the present law, such as trespass and invasion of privacy, would be viewed as clearly within the scope of the Federal Tort Claims Act, if the amendment is adopted.' S. Rep. No. 93-588, 93d Cong., 2nd Sess. (1973), reported in 2 U.S. Cong. & Admin. News, p. 2789 (1974)." At 564 F. 2d 540.

In the decision sought to be reviewed, the Eleventh Circuit reasoned that Mr. Metz's intentional infliction of emotional distress and intrusion into seclusion claims arose out of a false arrest and that Mr. Metz's false light claim and Mrs. Metz's claim for intentional infliction of emotional distress and for intrusion into her seclusion arose out of slander. However, in an analogous situation, this Court has stated that:

> "Common to both the misrepresentation and the negligence claim would be certain factual and legal questions. . . . But the partial overlap between these two tort actions does not support the conclusion that if one is excepted under the Tort Claims Act, the other must be as well. Neither the language nor history of the Act suggests that when one aspect of the Government's conduct is not actionable under the 'misrepresentation' exception, a claimant is barred from pursuing a distinct claim arising out of other aspects of the Government's conduct. The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."

Block v. Neal, 460 U.S. 289, 75 L. Ed. 2d 67, 75, 103 S. Ct. 1089 (1983).

CONCLUSION

It is respectfully submitted that the United States Court of Appeals for the Eleventh Circuit erred in holding that *all* of petitioners' claims for invasion of privacy and intentional infliction of emotional distress are barred by the provisions of 28 USC § 2680(h). Its decision in this case is in conflict with the decisons of three other Federal Courts of Appeal. Certainly the right to maintain an action against the Government under the Federal Tort Claims Act should not depend on the geographical area or Federal Circuit in which the claim arises. Therefore, petitioners respectfully pray that this Court grant their petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit for the purpose of reviewing its decision in this case.

This the 5 day of August, 1986.

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APPENDIX

George F. METZ and Ingrid Metz,
Plaintiffs-Appellants,

v.

UNITED STATES of America,
Defendant-Appellee.

No. 85-8417.

United States Court of Appeals,
Eleventh Circuit.

May 13, 1986

Federal employee and his wife brought action against the Government under Federal Tort Claims Act. The United States District Court for the Southern District of Georgia, Anthony A. Alaimo, Chief Judge, entered judgment for the Government, and plaintiffs appealed. The Court of Appeals, Anderson, Circuit Judge, held that: (1) provision of Federal Tort Claims Act permitting governmental liability on basis of actions of law enforcement officers could not be expanded to include governmental actors who procured law enforcement actions but who were themselves not law enforcement officers, and (2) plaintiffs' remaining claims arose out of causes of action excepted from coverage of Federal Tort Claims Act, and thus, were barred.

Affirmed.

Appeal from the United States District Court for the Southern District of Georgia.

Before GODBOLD, Chief Judge, and ANDERSON, Circuit Judge, and ATKINS*, Senior District Judge.

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* Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

ANDERSON, Circuit Judge:

George Metz and his wife, Ingrid, filed this action pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-80. Plaintiffs alleged that certain United States government officials committed a number of intentional torts for which the United States should be liable. The district court entered judgment for the government. Plaintiffs filed timely notice of appeal. We affirm.

I. FACTS

George Metz was a driving instructor at the Federal Law Enforcement Training Center ("FLETC") until his removal in November of 1982. FLETC is operated by the United States Department of the Treasury ("USDT") as a training service to various law enforcement agencies of the federal government. According to plaintiffs' complaint, between 1977 and 1979 George Metz was deliberately passed over for promotions in favor of less qualified and less deserving candidates. This treatment prompted Metz to vocalize to his fellow employees charges of misconduct against FLETC administrators. Metz asserts that his complaints precipitated a conspiracy among FLETC supervisors against him.

Metz claims, that, pursuant to this alleged conspiracy, his job performance was evaluated as "excellent" instead of the most favorable evaluation of "outstanding". This performance evaluation, completed by Metz's immediate supervisor, prompted Metz to become even more uncomplimentary of the supervisors in his conversations with other employees.

As a result of these conversations between Metz and his co-workers, Metz was asked to meet with James Lanier, Metz's immediate supervisor, on August 3, 1982. Also present at this meeting were two other FLETC supervisors, David Epstein and Robert McCann. Metz claims this meeting was a "trap" whereby the FLETC officials attempted to elicit statements that would later be used against him. At the meeting, Metz voiced his frustrations and concerns about his treatment by his supervisors. After the meeting, Metz, a reservist in the United States Marines, left to report for active duty at Columbia, South Carolina.

Based on their stated belief that Metz presented a threat to their personal safety, Metz's supervisors took the following actions. David McKinley and George Graves contacted Metz's priest, Father Raymond Carr, and requested that Carr accompany them to the Metz residence. At the time, McKinley was the director of FLETC and Graves was a supervisor. Carr was told that the visit was necessary to locate Metz and to ask his wife what she knew about the personal threats Metz had been making against his supervisors. Carr phoned Mrs. Metz and obtained her permission to bring Graves and McKinley over to visit. At the Metzes' residence, Mrs. Metz told Graves, McKinley and Carr that Metz was en route to South Carolina to report for military duty.

In the early morning of August 4, 1982, George Metz's supervisors obtained an arrest warrant against Metz on charges of "terroristic threats," a felony offense in Georgia. FLETC officials informed the Marines of the action taken against Metz. This communication to the Marine Corps led to Metz's seizure by Marine personnel and the search of Metz's vehicle, shortly after he arrived at the

South Carolina military base. Metz was subsequently transported to a nearby Army mental hospital for psychological evaluation. Metz claims that he was detained there for two days, after which time he was allowed to return to duty at his reservist position.

Despite his mental clearance by Army psychiatrists, on August 6, FLETC supervisors notified Metz that he was being placed on indefinite and involuntary sick leave status pending an examination by a civilian psychiatrist. A notice stating that Metz was being placed on indefinite sick leave status was posted by FLETC officials and viewed by other employees at FLETC.

Upon his return from military duty, Metz underwent another psychiatric evaluation and was again found to be normal in all respects. On October 14, 1982, Metz was notified that he was to return to work but would be assigned to another instructional program. This notification, however, was countermanded by Graves in a letter that informed Metz that FLETC intended to terminate him based on the threatening statements he allegedly made to his co-workers at the August 3 meeting. Metz responded with a letter to Graves that charged certain FLETC administrators with a conspiracy designed to force Metz's resignation from federal employment. Metz was notified of his termination from FLETC by a letter dated November 10, 1982. The decision to terminate was made by McCann.

In addition to appealing his termination through the Merit System Protection Board, plaintiffs filed a *Bivens* suit against certain FLETC administrators alleging numerous deprivations of their constitutional rights. The district

court dismissed that case, stating that the government employer-employee relationship is an area in which courts should hesitate to recognize constitutional causes of action. *Metz v. McKinley,* 583 F.Supp. 683, 688 (S.D.Ga.), *aff'd.* 747 F.2d 709 (11th Cir. 1984).

In the instant case, plaintiffs filed a multi-count complaint under the FTCA against the United States government seeking $18 million dollars in damages. The complaint included claims for false arrest, false imprisonment, invasion of both Mr. and Mrs. Metz's privacy, and intentional infliction of emotional distress upon both Mr. and Mrs. Metz. The Metzes raise all of these issues on appeal.

II. DISCUSSION

A. *False Arrest and False Imprisonment*

On appeal, the Metzes claim that the government can be held liable under the FTCA for the wrongful acts of USDT and FLETC officials who requested the false arrest and false imprisonment of George Metz, even though his arrest and confinement were effected by Marine Corps personnel. The Metzes claim that while the Marine Corps personnel acted in good faith, they were used as "instruments" or "tools" of the FLETC and USDT officials.[1]

---

1. In their appellate briefs and at oral argument, the Metzes assert that their claims against the United States government are not based on any wrongdoing by Marine personnel. Rather, the Metzes claim that the Marines were themselves without culpability but were "instrumentalities" or "tools" of FLETC and USDT. We construe the Metzes' position as an abandonment of any claim based on the culpability of the Marine Corps or Marine personnel. Therefore, we need not address the applicability of the doctrine of *Feres v. United States,* 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), and its progeny with respect to any potential liability of the United States based on the actions of the Marine personnel.

Brief of Appellants at 23-24. George Metz's false arrest and false imprisonment claims are brought pursuant to a particular subsection of the FTCA which provides as follows:

> The provision of this chapter and section 1346(b) of this title shall not apply to—
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. *Provided,* That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

28 U.S.C.A. § 2680(h) (Supp.1985) (emphasis in original). While claims for false arrest or false imprisonment generally are not viable under the FTCA, "with regard to acts or omissions of *investigative or law enforcement officers of the United States government,*" such claims may be brought against the government. *Id.* (emphasis added).

Metz contends that the Marine personnel that effected his allegedly false arrest and false imprisonment were "investigative or law enforcement officers" for the purposes of § 2680(h). Metz asserts that the FLETC and USDT officials wrongfully instigated his arrest and imprisonment, and that the government is liable for these torts because his former supervisors utilized "investiga-

tive or law enforcement officers'' to accomplish their goals. Assuming, but expressly not deciding, that Metz was falsely arrested and falsely imprisoned and that the Marine personnel who arrested and confined Metz are ''investigative or law enforcement officers'' for purposes of § 2680(h), we nevertheless reject Metz's claim. We conclude that the provision permitting governmental liability on the basis of actions of law enforcement officers cannot be expanded to include governmental actors who procure law enforcement actions, but who are themselves not law enforcement officers. The law enforcement proviso is by its terms limited to ''acts or omissions of investigative or law enforcement officers.'' In this regard, we agree with the holding of the Ninth Circuit in *Arnsberg v. United States*, 757 F.2d 971, 977-78 (9th Cir. 1984).

Thus, we hold that in this case there is no governmental liability for false arrest or false imprisonment. The Metzes have abandoned any claim of government liability based solely on the actions or culpability of the Marine personnel. *See supra note* 1. Because the FLETC and USDT officials are not themselves law enforcement officers[2] and because the law enforcement proviso cannot be expanded to apply to governmental actors who are not law enforcement officers, the provisions of § 2680(h) bar liability for false arrest and false imprisonment based on the actions of the FLETC and USDT officials.

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2. In rejecting Metz's claims of false arrest and false imprisonment against FLETC and USDT officials, the district court correctly determined that these defendants were not "investigative or law enforcement officers" for purposes of § 2680(h). Record on Appeal at 382-84. Metz does not argue otherwise on appeal.

B. *The Remaining Claims*

The Metzes' remaining claims on appeal are (a) that FLETC and USDT officials intruded into Mr. Metz's private seclusion by instigating Metz's arrest and the search of his car by Marine personnel, and that these officials intentionally inflicted emotional distress upon Mr. Metz by having him apprehended in Columbia, South Carolina and by terminating him from his employment position with FLETC; (b) that FLETC and USDT officials violated Mr. Metz's right of privacy by placing him in a false light in the public eye, and that these officials intentionally inflicted emotional distress upon Mrs. Metz during the August 3, 1982 visit to the Metz home; and (c) that FLETC and USDT officials invaded Mrs. Metz's privacy during that visit. Because we find that each of these causes of action "arose out of" a tort expressly delineated in 28 U.S.C. § 2680(h), we hold that the district court correctly found in favor of the government as to these claims.

The Metzes contend that because the torts of invasion of privacy and intentional infliction of emotional distress are not specificially listed in § 2680(h), such actions against the government are not barred by that subsection. A number of courts have accepted this reasoning. *See Gross v. United States,* 676 F.2d 295, 303-04 (8th Cir.1982) (intentional infliction of emotional distress not a tort specifically exempted by Congress in § 2680(h) and, therefore, action allowed); *Black v. Sheraton Corp. of America,* 564

F.2d 531, 539-40 (D.C.Cir.1977) (invasion of privacy not a tort specifically exempted by statute).[3]

In the recent case of *United States v. Shearer*, — U.S. —, 105 S.Ct. 3039, 87 L.Ed.2d 38 (1985), however, from members of the Supreme Court indicated that any claim "arising out of" the intentional torts listed in 28 U.S.C. § 2680(h) may not be pursued against the government under the FTCA.[4] In that case, an off-duty Army private was kidnapped and murdered by another serviceman. The victim's mother sued the government under the FTCA claiming that the Army's negligence caused her son's death. In finding that this claim was barred by the sovereign immunity retained under § 2680(h), Chief Justice Burger stated:

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3. Apparently the "arising out of" argument was not presented to either the *Gross* court or the *Black* court. However, the rationale that we employ in the instant case bears some resemblance to Judge Gibson's dissent in *Gross*, insofar as Judge Gibson focused on the nature of the underlying governmental acts which were being challenged. Compare the rationale of *Black* with that of *Art Metal—U.S.A., Inc. v. United States*, 753 F.2d 1151 (D.C.Cir.1985), and *JM Mechanical Corp. v. United States*, 716 F.2d 190, 194-95 (3d Cir.1983).

4. In *Shearer*, Chief Justice Burger, and Justices White, Rehnquist, and O'Connor joined the portion of the opinion dealing with § 2680(h). Justices Brennan, Blackmun, Stevens, and Marshall concurred in a portion of the opinion dealing with the *Feres* doctrine, and concurred in the judgment. These members of the court gave no explanation as to why they did not join in Chief Justice Burger's FTCA analysis. Justice Powell took no part in the decision of this case. Although the relevant part of the *Shearer* opinion was joined by only four Justices, the analysis is consistent with *Block v. Neal*, 460 U.S. 289, 103 S.Ct. 1089, 75 L.Ed.2d 67 (1983) and *Kosak v. United States*, 465 U.S. 848, 104 S.Ct. 1519, 79 L.Ed.2d 860 (1984), discussed *infra*, both of which commanded a majority.

> The Federal Tort Claims Act's waiver of sovereign immunity does not apply to "[a]ny claim arising out of assault [or] battery," 28 U.S.C. § 2680(h), and it is clear that respondent's claim arises out of the battery committed by Private Heard. No semantical recasting of events can alter the fact that the battery was the immediate cause of Private Shearer's death and, consequently, the basis of respondent's claim.
>
> Respondent cannot avoid the reach of § 2680(h) by framing her complaint in terms of negligent failure to prevent the assault and battery. Section 2680(h) does not merely bar claims *for* assault or battery; in sweeping language it excludes any claim *arising out of* assault or battery. We read this provision to cover claims like respondent's that sound in negligence but stem from a battery committed by a Government employee. Thus, "the express words of the statute" bar respondent's claim against the Government. *United States v. Spelar,* 338 U.S. 217, 219 [70 S.Ct. 10, 11, 94 L.Ed.3] (1949) . . . . [I]t appears that Congress believed that § 2680(h) would bar claims arising out of a certain type of factual situation—deliberate attacks by Government employees.

Shearer, — U.S. at —, 105 S.Ct. at 3042 (emphasis in original).

In a related context, the Supreme Court in *Kosak v. United States,* 465 U.S. 848, 104 S.Ct. 1519, 79 L.Ed.2d 860 (1984), has indicated that the phrase "arising out of" should be broadly construed. In that case, a plaintiff brought a claim under the FTCA for damage done to his property during the time it was being held by the Customs Service as the subject of forfeiture proceedings. The government argued that this claim was barred by 28 U.S.C. § 2680(c) which exempts from the coverage of the FTCA "[a]ny claim arising in respect of . . . the detention of any

goods or merchandise by any officer of Customs." The plaintiff asserted that the exemption covered only claims for damage caused by the detention itself, such as a decline in economic value, and not for negligent destruction of property while in the possession of the Customs service. *Kosak,* 104 S.Ct. at 1522-23.

The court of appeals in that case held that § 2680(c) shields the United States from "all claims arising out of detention of goods by Customs officers and does not purport to distinguish among types of harm." 679 F.2d 306, 308 (3d Cir.1982). Analogizing to language contained in other exemptions of the FTCA, the Supreme Court affirmed the Third Circuit stating that " 'any claim arising in respect of' the detention of goods, means any claims 'arising out of' the detention of goods, and includes a claim resulting from negligent handling of storage of detained property." 104 S.Ct. at 1524. The Supreme Court rejected the plaintiff's contention that the legislative history of § 2680(c) and the structure of the statute as a whole implied that the exemption of § 2680(c) was a narrow one. Instead, the Court stated that the statutory language "sweep[s] within the exception all injuries associated in any way with the 'detention' of goods." *Id.* at 1523.[5]

In *Block v. Neal,* 460 U.S. 289, 103 S.Ct. 1089, 75 L.Ed.2d 67 (1983), the Supreme Court supplied perhaps the clearest guidance to lower federal courts called upon to interpret 28 U.S.C. § 2680(h). In that case, the Court ad-

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5. In his dissent in *Kosak,* Justice Stevens reasoned that because Congress used the words "arising in respect of" rather than "arising out of" in § 2680(c), § 2680(c) should be read more narrowly than those exemptions containing the phrase "arising out of." 104 S.Ct. at 1528-32 (Stephens, J., dissenting).

dressed the question of whether a plaintiff's claim against the Farmer Home Administration for negligent supervision of the construction of a house "arose out of misrepresentation" within the meaning of § 2680(h). In its analysis, the *Neal* Court examined whether the plaintiff had alleged any injury independent of her reliance on the alleged misrepresentation. 103 S.Ct. at 1093. Because the Court found that the government's duty to use due care in supervising and inspecting construction was distinct from its duty of due care in communicating information, because the government's misstatements were not essential to Neal's claim, and because Neal's claim arose "out of other aspects of the Government's conduct," the Court concluded that Neal's claim for negligent supervision did not "arise out of misrepresentation" for the purposes of 28 U.S.C. § 2680(h). 103 S.Ct. at 1094.

Thus, the Supreme Court has made clear that 28 U.S.C. § 2680(h) is to be construed more broadly than the Metzes contend. While the Metzes would have us limit the exemptions of that section to those torts specifically named therein, *Shearer, Kosek* and *Neal* indicate that the phrase "arising out of" is to be given some meaning. The meaning which we derive from the foregoing Supreme Court cases is that a cause of action which is distinct from one of those excepted under § 2680(h) will nevertheless be deemed to "arise out of" an excepted cause of action when the underlying governmental conduct which constitutes an excepted cause of action is "essential" to plaintiff's claim. *Neal,* 103 S.Ct. at 1094 ("In this case . . . the Government's misstatements are not *essential* to plaintiff's negligence claim"; "the partial overlap between these two tort actions

does not support the conclusion that if one is excepted under the Tort Claims Act, the other must be as well. Neither the language nor history of the Act suggests that when one aspect of the Government's conduct is not actionable under the 'misrepresentation' exception, a claimant is barred from pursuing a distinct claim *arising out of other aspects of the Government's conduct.*") (emphasis added). In other words, § 2680(h) bars "claims arising out of a certain type of factual situation." *Shearer,* 105 S.Ct. at 3042, leaving a plaintiff free, however, to pursue "a distinct claim arising out of other aspects of the Government's conduct." *Neal,* 103 S.Ct. at 1094.

Our task is to "identify 'those circumstances which are within the words and reason of the exception'—no less and no more." *Kosak,* 104 S.Ct. at 1523 n. 9. In the instant case, "the express words of the statute," *Shearer,* — U.S. at —, 105 S.Ct. at 3042, operate to bar the Metzes' remaining claims.[6]

1. George Metz's intentional infliction of emotional distress and intrusion into seclusion claims.

Mr. Metz claims that the seizure of his person renders the government liable for intentional infliction of emotional distress and intrusion into his private seclusion, a type of

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6. *See Art Metal—U.S.A., Inc. v. United States,* 753 F.2d 1151 (D.C.Cir.1985) (government contractor's claim for injurious falsehood barred by 28 U.S.C. § 2680(h) as a claim arising out of libel or slander; applying *Block v. Neal,* 460 U.S. 289, 103 S.Ct. 1089, 75 L.Ed.2d 67 (1983)). In *JM Mechanical Corp. v. United States,* 716 F.2d 190, 195, the Third Circuit applied *Block v. Neal* in the same manner as we do in this case. There the Third Circuit held that the barred misrepresentation claim was not "essential" to the asserted claim.

invasion of privacy.[7] Amended and Recast Complaint, Count II ¶ 3 in Record on Appeal, at 207. Applying the *Block v. Neal* analysis, it is clear that an injury Metz has suffered as a result of these alleged torts stems from Metz's false arrest, a tort expressly exempted from the coverage of the FTCA.[8] In other words, the government's actions tthat constitute a claim for false arrest are essential to Mr. Metz's claims for intentional infliction of emotional distress and intrusion into seclusion. There is no other government conduct upon which such claims can rest. Thus, even though the claims may be distinct from a false arrest claim, any such difference is merely theoretical and not actual under the facts of this case. We conclude that these claims "arise out of" false arrest and are barred by 28 U.S.C. § 2680(h).

2. George Metz's false light claim and Ingrid Metz's intentional infliction of emotional distress claim.

Mr. Metz claims that statements made by FLETC and USDT officials placed him in a false light in the public eye. This tort is another branch of invasion of privacy. Mrs.

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7. The tort of invasion of privacy has four loosely related branches: appropriation, intrusion, public disclosure of private facts and false light. W. Prosser, *Handbook of the Law of Torts* § 117 (4th ed. 1971).

8. Although both parties, to some extent, look to Georgia law in analyzing whether the Metzes' claims fall within a § 2680(h) exception, the proper analysis is a comparison between the plaintiffs' claims and the "traditional and commonly understood definition" of the torts excepted by that section, rather than a comparison with the law of any particular state. *See United States v. Neustadt*, 366 U.S. 696, 706, 81 S.Ct. 1294, 1300, 6 L.Ed.2d 614 (1961); *Jimenez-Nieves v. United States*, 682 F.2d 1, 3-4 (1st Cir.1982).

Metz's claim for intentional infliction of emotional distress is based upon the allegedly false statements made to her by FLETC and USDT officials on the night of August 3, 1982. Assuming that the allegations forming the basis of these claims are true, we find that both claims are barred under the terms of the FTCA. The "wrong" about which the Metzes complain in both of these claims are the statements themselves, just as the "wrong" about which the plaintiff in *Shearer* complained was the battery that resulted in the death of her son. *See Shearer,* — U.S. at —, 105 S.Ct. at 3042. In this case the governmental statements complained of constitute slander, which is of course enumerated in § 2680(h). Applying the Supreme Court's analysis in *Neal,* the government officials' allegedly slanderous statements are essential to Mr. Metz's action for false light privacy and Ingrid Metz's claim for intentional infliction of emotional distress.[9] *See Block v. Neal,* 460 U.S. at 297-99, 103 S.Ct. at 1094. There is no other governaction upon which these claims could rest. These claims, therefore, "arise out of" slander for the purposes of § 2680(h) and are not actionable under the FTCA.

3. Ingrid Metz's claim for intrusion into seclusion.

Ingrid Metz alleges that FLETC administrators McKinley and Graves violated her private solitude when they

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9. Although we recognize that claims for intentional infliction of emotional distress do not necessarily depend on the falsity of a defendant's statements, under the facts of this case, Mrs. Metz would not be able to state such a claim if the FLETC officials' statements were true. We have no trouble, therefore, finding that the allegedly slanderous statements are essential to Mrs. Metz's claim for intentional infliction of emotional distress in our application of the *Block v. Neal* analysis.

visited her residence on the night of August 3, 1982. The district court disposed of this issue on summary judgment by holding that there was no invasion of Mrs. Metz's privacy because, among other reasons,[10] "she willingly agreed to talk to the officials and freely admitted them into her house along with Father Carr." Record on Appeal at 392. On appeal, the Metzes contend that the FLETC officials would not have been admitted to the Metz home had they not grossly misrepresented the facts and their intentions to Father Carr. Because Mrs. Metz was in turn misinformed by Carr, the Metzes claim that her consent to the intrusion was not a valid waiver of her right to privacy, or at least there is a genuine issue of fact in this regard.[11] Brief of Appellants at 48.

Assuming, but expressly not deciding, that Ingrid Metz's consent was invalid, it is invalid solely because it was given in response to false statements made by FLETC officials. Those allegedly false statements constitute the basis for a slander claim. Because the alleged slander is essential to Ingrid Metz's assertion that her consent was invalid, and because that assertion is in turn essential to her claim for intrusion, we conclude that her claim for in-

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10. The district court also found that Georgia law required a physical invasion into a plaintiff's private solitude in order to make out an action for invasion of privacy, and that no such physical invasion was present in this case. Record on Appeal at 390-92.

11. Although the district court granted the government's 12(b)(6) motion to dismiss for all claims except one, the district court converted this motion into a motion for summary judgment which was granted with respect to Ingrid Metz's claim for invasion of privacy. Because of our disposition of this claim, we can assume the Metzes' version of the facts as true and eliminate any genuine issue of fact.

trusion "arises out of" slander. *See Block v. Neal,* 103 S.Ct. at 1094.[12] Ingrid Metz's claim for intrusion into her private seclusion, therefore, is not actionable under the FTCA.

For the foregoing reasons, the decision of the district court is

AFFIRMED.

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12. The fact that the injuries alleged in Mrs. Metz's claims for intentional infliction of emotional distress and intrusion into her private seclusion may be different from the injuries Mr. Metz might suffer as a result of slander does not alter our conclusion. Section 2680(h) shields the government from all claims arising out of slander "and does not purport to distinguish among types of harm." *See Kosak v. United States,* 679 F.2d 306, 308 (3d Cir.1982), *aff'd,* 465 U.S. 848, 104 S.Ct. 1519, 79 L.Ed.2d 860 (1984) (analyzing "arising in respect of" language of 28 U.S.C. § 2680(c)).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

CIVIL ACTION

NO. 283-178

GEORGE F. METZ and INGRID METZ,

Plaintiffs

V.

THE UNITED STATES OF AMERICA,

Defendant

O R D E R

(Filed March 26, 1985)

This action is the second of two concomitant suits brought by George Metz and his wife, Ingrid, after he was terminated from his federal employment position as a driving instructor at the Federal Law Enforcement Training Center ("FLETC") in Brunswick, Georgia. Plaintiffs filed the immediate action pursuant to the Federal Tort Claims Act ("FTCA" or "Act"), 28 U.S.C. §§ 1346(b), 2671 *et seq.*, alleging that certain officials of the United States Government committed a host of intentional torts against them. Defendant originally moved to dismiss plaintiffs' amended complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. The Fed.R.Civ.P. 12(b)(6) motion was later converted to one for summary judgment by Order of the Court on February 1, 1985. Having read and considered the entire record, including evidentiary matters and the parties' briefs in support of their respective positions

on defendant's motion, the Court now finds the matter ripe for disposition.

FACTUAL BACKGROUND

George Metz was a driving instructor at the FLETC facility until his removal in November of 1982. FLETC is operated by the United States Department of the Treasury ("USDT") as a training service to various law enforcement agencies of the Federal Government. The facility offers a variety of training courses in weaponry, surveillance techniques and automobile maneuvering.

According to plaintiffs' amended complaint, George Metz's personnel problems with FLETC administrators occurred between 1977 and 1979. During this two-year period, Metz claims that he was deliberately passed over for promotions in favor of less-qualified and less-deserving candidates. This alleged deliberate treatment at the hands of the FLETC administrators, in turn, caused Metz to vocalize various charges of misconduct against some of them to his fellow employees. He asserts that these complaints precipitated a conspiracy among the FLETC supervisors to rid themselves of George Metz.

Metz claims that, pursuant to this alleged conspiracy, in July of 1982 he received a demotion in the characterization of his job performance from "outstanding" to "excellent." The performance evaluation was completed by Metz's immediate supervisor in the Driver Specialties Branch at FLETC. This performance evaluation prompted Metz to become even more uncomplimentary of the supervisors in his frank conversations with other nonsupervisory FLETC employees.

As a result of these "conversations" Metz had with his co-workers, he was asked to attend a meeting on August 3, 1982, with James Lanier. Lanier was Metz's immediate supervisor in the Driving Instructor's branch of the faculty at FLETC. Also present at this meeting were David Epstein and Robert McCann, supervisors in the Faculty Management division of FLETC. Metz characterizes this meeting as a "trap" whereby the FLETC officials attempted to elicit statements that would later be used against him. On the other hand, Metz characterizes his own conduct at the meeting as a "voicing of his frustrations and concerns" about his treatment at the hands of his supervisors.

At the conclusion of this meeting, Metz, a reservist in the United States Marine Corps, departed to report for active duty at a military installation in Columbia, South Carolina. For whatever reason, Metz's supervisors decided that he presented a threat to their personal safety. Based on this belief, the Government officials took the following course of action. First, David McKinley and George Graves contacted the priest at the plaintiffs' parish, Father Raymond Carr, and requested that he accompany them to the Metz residence. McKinley was the then-Acting Director of FLETC and Graves was another supervisor in the Driving Instructor's branch. McKinley and Graves told Father Carr that the visit was necessary to locate Metz and to ask his wife, Ingrid Metz, what she knew about the personal threats her husband had been making against one or more of his supervisors. Father Carr telephoned Mrs. Metz and obtained her permission to bring Graves and McKinley over to visit. At this visit,

Graves and McKinley were told that Metz was on his way to Columbia, South Carolina, to report for duty in the military.

In the early morning hours of August 4, 1982, Metz's supervisors secured an arrest warrant against Metz on charges of "terroristic threats," a felony offense in Georgia. Plaintiffs allege that the warrant was obtained on the advice of FLETC's legal counsel, John O'Meara. FLETC officials also contacted the United States Marine Corps to advise them of the action taken against Metz. The communication to the Marine Corps led to the seizure of Metz, and the search of his vehicle, soon upon his arrival at the Training Center of the South Carolina military base. While in custody, he was subsequently transported to a nearby Army mental hospital for psychological evaluation. There, Metz claims he was detained until August 6, 1982, at which time he was cleared to return to duty at his reservist position.

His mental clearance by the Army psychiatrists did not, however, convince FLETC officials of Metz's mental stability and nonaggressive tendencies toward them. On August 6, FLETC supervisors notified Metz that he was being placed on indefinite and involuntary sick leave status pending an examination by a civilian psychiatrist. A notice to the effect that Metz was being placed on indefinite sick leave status was posted by FLETC officials and viewed by other employees at FLETC. Metz also claims that his desk was searched without his permission on August 8.

After serving out his remaining temporary duty in the military without further incident, Metz returned to Brunswick. He underwent another psychiatric evaluation

and was again found to be normal in all respects. On October 14, 1982, Metz was notified that he was to return to work but would be assigned to another instructional program. This notification, however, was countermanded by letter from Graves dated October 20, 1982. The letter informed Metz that FLETC intended to terminate him based on the threatening statements he allegedly made to his coworkers at the August 3 meeting. The letter also advised Metz of the full panoply of administrative procedures which were available to him in contesting his termination. Counsel for Metz responded with a letter addressed to Graves that charged certain FLETC administrators with a conspiracy designed to force Metz's resignation from federal employment.

Upon consideration of the response of Metz's lawyer and to evidence of the purported life-threatening statements attributed to Metz, he was notified of his termination from FLETC by letter date November 10, 1982. The decision to terminate was made by McCann. McCann's notification letter also delineated Metz's right to appeal the decision to the Merit System Protection Board.

Rather than relying solely on the Merit Board appeal process, plaintiffs filed the first of two suits in this Court on November 11, 1982. In that action, *Metz v. McKinley, et al.*, 583 F.Supp. 684 (S.D.Ga. 1984), plaintiffs initiated a *Bivens* suit against certain members of the FLETC administration alleging "numerous deprivations of their constitutional rights." *Metz, supra,* at 685; *see also Bivens v. Six Unknown Narcotics Agents,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) (private individual permitted to sue federal officers who have violated his constitutional rights). Relying on *Bush v. Lucas,* 647 F.2d 573 (5th Cir.

Unit B 1981), and *Gleason v. Malcolm,* 718 F.2d 1044 (11th Cir. 1983), this Court disposed of plaintiffs' *Bivens* action on a motion to dismiss, holding that the Government employer-employee relationship is an area which "counsel[s] hesitation in the recognition of a constitutional cause of action." *Metz, supra,* at 688.

In the case at bar, plaintiffs filed a multi-count complaint under the FTCA against the United States Government seeking $18 million in damages.[1] Plaintiffs contend that certain officers of the United States Marine Corps invaded Metz's right to privacy, falsely arrested and imprisoned him and conducted an illegal search of his truck and personal belongings. Plaintiffs further assert that various agents of USDT and FLETC intentionally inflicted emotional distress upon Metz by "procur[ing] a warrant for his arrest and charging him with the felony, under Georgia law, of making "terroristic threats.'" Plaintiffs' Amended Complaint, at 5-6. Finally, plaintiffs allege that FLETC administrators McKinley and Graves violated the private solitude of Ingrid Metz and intentionally inflicted emotional distress upon her when they paid a visit to the Metz home residence.

In response, defendant moved to dismiss plaintiffs' amended complaint on four grounds. First, defendant asserts that plaintiffs' claims against all agents, officers and employees of the United States Marine Corps are

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[1] Plaintiffs' original complaint also included an assortment of pendent state claims alleging, for all intents and purposes, similar offenses. These claims were dismissed voluntarily by plaintiffs in their amended complaint. The Court notes that 28 U.S.C. § 2679 precludes a plaintiff from bringing pendent state claims which are identical to those brought under the FTCA.

barred by the *Feres* doctrine, *see Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), or, in the alternative, by 28 U.S.C. § 2680(h).[2] Second, defendant argues that Metz's allegations against the agents, officers or employees of the USDT and FLETC relating to privacy invasion, false arrest, false imprisonment and intentional infliction of emotional distress are likewise prohibited by 28 U.S.C. § 2680(h). Third, defendant contends that the actions of the FLETC officials in visiting and conversing with Ingrid Metz at her home residence did not invade her private sanctity because she had invited the officials to her home to discuss her husband's supposedly unstable mental condition. Finally, the Government asserts that Ingrid Metz's claim of intentional infliction of emotional distress against certain FLETC administrators is also barred by 28 U.S.C. § 2680(h) because, under Georgia law, "intentional infliction of emotional distress is synonymous with an assault and such a

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[2] 28 U.S.C. § 2680 provides:

The provisions of this chapter [FTCA] and section 1346(b) of this title shall not apply to—

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. Provided, that with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of the proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

cause of action would be barred by 28 U.S.C. § 2680(h)." Government's Memorandum Brief, at 21. The Court will deal with the parties' contentions *seriatim.*

DISCUSSION

A. *Claims Against Officers of the Marine Corps*

Prior to the enactment of the FTCA in 1946, the United States was shielded from suit by the common law doctrine of sovereign immunity. *See Feres,* 340 U.S. at 139, 71 S.Ct. at 156, 95 L.Ed. at 157; *Johnson v. United States,* No. 83-5764, slip op. at 1533 (11th Cir. Jan. 10, 1985). In an effort to mitigate the unjust consequences which developed from sovereign immunity, Congress permitted the United States to be held liable in tort "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674; *Feres,* 340 U.S. at 139, 71 S.Ct. at 156, 95 L.Ed. at 157; *Johnson, supra,* at 1533. The FTCA further provided the district courts with exclusive jurisdiction over all:

> civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)

Four years after the enactment of the FTCA, the Supreme Court determined that Congress, in drafting the Act, did not intend to waive the Government's sovereign

immunity for "injuries to servicemen where the injuries arose out of or were in the course of activity incident to service." *Feres v. United States*, 340 U.S. at 146, 71 S.Ct. at 159, 95 L.Ed. at 161; *see also Parker v. United States*, 611 F.2d 1007, 1009-11 (5th Cir. 1980). The Court advanced four reasons for limiting the scope of the FTCA: (1) the absence of parallel private liability; (2) the belief that, because state law must be consulted under the FTCA, it would be irrational to leave servicemen injured by others in the military dependent upon geographic considerations over which they have no control; (3) the "distinctively federal character" of the relationship between the United States and those in the military; and (4) the availability of a no-fault compensation. *Id.* at 141-46, 71 S.Ct. at 156-59, 95 L.Ed. at 158-61; *Johnson, supra,* at 1534. The Court concluded its opinion in *Feres* by stating that "[w]e do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service connected injuries or death due to negligence." 340 U.S. at 146, 95 S.Ct. at 159, 95 L.Ed. at 161.

Recently, the Supreme Court reexamined the theoretical underpinnings of the *Feres* doctrine in *Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977), and *Chappell v. Wallace*, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983). In *Stencel,* the Court reaffirmed those factors which it deemed essential in the *Feres* doctrinal analysis: (1) the distinctively federal character of the relationship between the soldier and the sovereign; (2) the existence of no-fault statutory compensation scheme which serves as a substitute for governmental tort liability; and (3) the Court's concern, first enunciated in *United States v. Brown*, 348

U.S. 110, 75 S.Ct. 141, 99 L.Ed.2d 139 (1954), about the effect on the military disciplinary structure that would obtain if tort litigation were countenanced. *Stencel*, 431 U.S. at 670-73, 97 S.Ct. at 2057-59; *see also Johnson, supra,* at 1536; *Brown v. United States*, 739 F.2d 362, 365 (8th Cir. 1984). A few years later, the Supreme Court in *Chappell* relied heavily on the third factor[3] mentioned in *Stencel* and stressed the unique military need for discipline and obedience to orders, and only on the battlefield, but in training as well:

> Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment.

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[3] The force and logic of the first two factors mentioned in *Stencel* have been undercut substantially by decisions subsequent to *Feres*. Many courts have noted, for instance, that the argument that the military relationship is distinctly federal applies just as readily to other federal agencies which may be held liable under the FTCA. *See, e.g., Brown v. United States, supra,* at 365; *Johnson v. United States*, 704 F.2d 1431, 1435 (9th Cir. 1983); *Jaffee v. United States*, 663 F.2d 1226, 1233 n.7 (3d Cir. 1981) (en banc), *cert. denied*, 456 U.S. 972, 102 S.Ct. 2234, 72 L.Ed.2d 835 (1982). The second rationale refers to the Veterans Benefit Act—an alternative compensation system which establishes a statutory scheme for providing pensions to injured servicemen without regard to any negligence on the part of the Government as a substitute for tort liability. Because the Supreme Court has applied this rationale inconsistently, some courts have minimized the importance of it. *See, e.g., Brown v. United States, supra,* at 365; *Johnson*, 704 F.2d at 1435; *Hunt v. United States*, 636 F.2d 580, 598 (D.C.Cir 1980); *Parker v. United States*, 611 F.2d 1007, 1011 (D.C.Cir. 1980); *Healy v. United States*, 192 F.Supp. 325, 328 n.13 (S.D.N.Y.), *aff'd*, 295 F.2d 958 (2d Cir. 1961).

103 S.Ct. at 2365; *See also Brown v. United States, supra,* at 365; *Johnson v. United States,* 704 F.2d 1431, 1436-37 (9th Cir. 1983).

In the instant action, plaintiffs submit that "the false imprisonment of George Metz and the injuries suffered by him as a result thereof had absolutely nothing to do with his Marine Corps career; did not arise out of and were not incident to military service." Plaintiffs' Brief in Response to Defendant's Motion to Dismiss, at 23 (filed February 16, 1984). Relying on the Fifth Circuit's reasoning in *Parker v. United States,* 611 F.2d 1007, 1014 (5th Cir. 1980), plaintiffs urge this Court to avoid the use of a "but for" test in determining whether George Metz's injury was "incident to service." *See United States v. Brown,* 348 U.S. at 113, 114, 75 S.Ct. 141 (Black, J., dissenting); *Brooks v. United States,* 337 U.S. at 52, 69 S.Ct. at 920. More specifically, plaintiffs suggest that, although Metz would not have been at the Marine Corps Training Center (where he was arrested and detained by Marine Corps officers) had he not been a Marine reservist, the Court should not infer from this fact that he was injured "incident to service." Plaintiffs' Responsive Brief, at 23. On the contrary, plaintiffs assert that, at the time George Metz was arrested, he was dressed in running clothes and was preparing to go jogging, indicating that he had reported to the Training Center prior to the time required of him in his orders. Finally, plaintiffs rely on the deposition testimony of two Marine Corps officers in averring that this matter had no relation with or effect on his military service. *See* Deposition of Major Eric Braithwaite, at 8; Deposition of Colonel Newsome, Jr., at 20-21.

After reviewing the relevant precedent, the Court cannot reach the result urged by the plaintiffs. The record indicates that George Metz was permitted on the Marine Training Center because of his military status. Although he had reported prior to the time required of him in his orders, Metz was on active duty at the time of his arrest and was, therefore, subject to military orders and discipline at all times while in the Training Center. In the regard, the Second Circuit has stated:

> As a general rule, an injury to a member of the armed forces, on active duty, *which occurs at a military base or installation,* . . . is an injury aris[ing] out of or [is] in the course of activity incident to [military] service," . . . for purposes of barring suit under the Federal Torts Claim Act.

Kohn v. United States, 680 F.2d 922, 924 (2d Cir. 1982), quoting *Camissar v. United States,* 531 F.2d 1139, 1151 (2d Cir. 1976) (per curiam) (emphasis supplied); *see also Charland v. United States,* 615 F.2d 508 (9th Cir. 1980); *Uptegrove v. United States,* 600 F.2d 1248 (9th Cir. 1979), *cert. denied,* 444 U.S. 1044, 100 S.Ct. 7323, 62 L.Ed.2d 790 (1980).

The Court, therefore, heeds the admonitions of the Supreme Court in *Chappell* and *Stencel* and declines to assert its jurisdiction in this instance for fear that doing so would tamper with the established relationship between enlisted military personnel and their superior officers. With this basic tenet in mind, the Court finds that plaintiffs' claims premised on wrongful actions taken by members of the United States Marine Corps are barred by the *Feres* doctrine. Havings reached this result, the Court declines to decide the question of whether plaintiffs' claims

against the Marine Corps officers are likewise barred by 28 U.S.C. § 2680(h).

B. *Claims Against Officials and Employees of USDT and FLETC*

Plaintiffs have also brought claims against agents and employees of the USDT and FLETC alleging that these officials directed and procured the false arrest and imprisonment of George Metz. Defendant moves to dismiss these claims on the basis of 28 U.S.C. § 2680(h).

Title 28 U.S.C. § 2680, as originally enacted, stated that:

> The provisions of this chapter [FTCA] and section 1346(b) of this title shall not apply to—
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

In 1974, the statute was amended so that:

> with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of the proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

The issue in this respect then becomes one of statutory construction, specifically whether administrators of the

USDT and FLETC are "investigative or law enforcement officers" within the purview of § 2680(h) as amended.

The Court's review of the legislative history reveals that Congress adopted the 1974 amendment to the FTCA in response to the "no-knock" raids conducted by federal narcotic agents on the wrong home dwellings. S. Rep. No. 588, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 2789, 2790-92; *see also* 21 U.S.C. § 879. In an effort to provide compensation for such victims, Congress sought to waive its sovereign immunity for particular intentional torts only in limited circumstances. *Solomon v. United States*, 590 F.2d 309, 310 (5th Cir. 1977). Spefically, the report of the Senate Committee on Government Operations stated:

> This amendment . . . grows out of hearings held by the committee on the reorganization plan last spring. During the course of these hearings, several incidents were brought to the committee's attention in which federal narcotics agents engaged in abusive, illegal and unconstitutional "no-knock" raids. The committee's amendment is designed to prevent further abuses of the federal "no-knock" statute [21 U.S.C. § 879]. The effect of this provision [§ 2680(h)] is to deprive the federal government of the defense of sovereign immunity in cases in which federal law enforcement agents, acting within the scope of their employment, or under color of federal law, commit any of the following torts: assault, battery, false imprisonment, false arrest, malicious prosecution, or abuse of process. Thus, as of the day of the enactment of this measure, innocent individuals who are subjected to raids of the type conducted in Collinsville, Illinois, would have a cause of action against the individual federal agents and the federal government.

Id. at 2790-91. This committee report has been cited by other courts in construing the 1974 amendment strictly.

See Kohn, supra, at 926 (military correctional officer held not to be "investigative or law enforcement officer" within meaning of the statute); *Solomon, supra,* at 310 (same result as to security employees of a military exchange); *Bates v. United States,* 517 F.Supp. 1350, 1356 (W.D.Mo. 1981) (same holding as to military policemen on a military base).

In the instant case, the administrative officials of the USDT and FLETC would be "investigative or law enforcement officers" within the purview of § 2680(h) only if they were (1) empowered by law to execute searches, to seize evidence or to make arrests for violations of federal law, or (2) acting within the scope of their employment in conducting searches, seizures and arrests for violation of federal laws. The administrators are not so empowered by law. Nor would such actions be within the scope of their employment. *See* 31 C.F.R. § 700 *et seq.* (1984) (regulations governing conduct in or on the FLETC buildings and grounds).

In view of the statute's language and legislative history, the Court concludes that plaintiffs' claims of false arrest and false imprisonment are completely barred by sovereign immunity.

C. Claims of Intentional Infliction of Emotional Distress

Plaintiffs allege that officials of USDT and FLETC caused each plaintiff, Ingrid and George Metz, to suffer emotional distress. More specifically, plaintiffs assert that the Government agents inflicted emotional distress upon Metz by apprehending him in Columbia, South Carolina, and then later terminating from his employment position with FLETC. Plaintiffs further assert that the visit of

particular FLETC officials to the Metz home led Mrs. Metz to suffer emotional distress.

Defendant again has invoked the intentional torts exception to the FTCA, 28 U.S.C. § 2680(h), in asserting that plaintiffs' claims be barred. Defendant recognizes that § 2680(h) does not mention specifically the tort of intentional infliction of emotional distress. Defendant nonetheless argues that the intentional tort exception should apply in this case because, under Georgia law, intentional infliction of emotional distress is synonymous with simple assault, a tort specifically enumerated in the statute.

The issue before this Court in this respect is whether these two torts are sufficiently similar under Georgia state law so as to permit defendant to invoke the intentional tort exception of the FTCA, 28 U.S.C. § 2680(h), thereby barring plaintiffs' claims for intentional infliction of emotional distress. This question has never been addressed squarely by a Georgia court to date. Nor have the parties cited any authority supporting or denying this proposition. The Court begins its inquiry with a review of the law of intentional infliction of emotional distress and assault in Georgia.

Georgia has long recognized a cause of action for intentional infliction of emotional distress. *See Georgia Power Company v. Johnson,* 155 Ga. App. 862, 274 S.E.2d 17 (1980); *Stephen v. Waits,* 53 Ga. App. 44, 184 S.E.2d 781 (1936); *Dunn v. Western Union Telephone Co.,* 2 Ga. App. 845, 59 S.E. 189 (1907). To recover for emotional distress, plaintiff must show that "defendant's actions were so terrifying or insulting as naturally to humiliate, embarrass or frighten the plaintiff." *Georgia Power Com-*

pany, supra, at 863. The defendant must have committed a "wanton, voluntary or intentional wrong the natural result of which is the causation of mental suffering . . . ." *Whitemore v. Woodbury,* 154 Ga. App. 159, 267 S.E.2d 783 (1980), *modified in* 246 Ga. 349, 271 S.E.2d 491 (1980); *Stephen, supra.* It is not necessary, however, that plaintiff's mental suffering or wounded feelings be "[a]ccompanied by injury to purse or person." *Digsby v. Carroll Baking Co.,* 76 Ga. App. 656, 662, 47 S.E.2d 203 (1948), *citing Dunn v. Western Union Tel. Co.,* 2 Ga. App. 845(3), 59 S.E. 189 (1907); *Young v. W. & A. Railroad,* 39 Ga. App. 761, 766, 148 S.E. 414 (1929).

Nor must the plaintiff demonstrate that defendant intended to produce the emotional distress. *Pierson v. News Group Publications, Inc.,* 549 F.Supp. 635, 641 (S.D. Ga. 1982). Rather, it is a reckless and willful disregard of the consequences of one's actions, coupled with the knowledge of the probable results, which forms a basis for recovery. *Delta Finance Company v. Ganakas,* 98 Ga. App. 297, 81 S.E.2d 383 (1956); *see also Young v. Colonial Oil Company,* 451 F.Supp. 360, 361 (M.D.Ga. 1978) (defendant's behavior must amount to "egregious physically intimidating conduct . . .").

Like intentional infliction of emotional distress, there is no statutory provision in Georgia tort law which specifically deals with civil actions for non-criminal assault. O.C.G.A. § 51-1-13 provides:

> [a] physical injury done to another shall give a right of action to the injured party, whatever may be the intention of the person causing the injury, unless he is justified under some rule of law. However, intention shall be considered in the assessment of damages.

Furthermore, O.C.G.A. § 51-1-14 provides:

> Any violent injury or illegal attempt to commit a physical injury upon a person is a tort for which damages may be recovered.

Any unlawful touching, whether direct or indirect, constitutes physical injury under the statute and may be an actionable offense. *Interstate Life & Accident Co. v. Brewer,* 56 Ga. App. 599, 193 S.E. 458 (1937); *Christy Bros. Circus v. Turnage,* 38 Ga. App. 581, 144 S.E. 680, *cert. denied,* 38 Ga. App. 816 (1928). Therefore, it is the apprehension of an unlawful touching, and not the actual touching itself, which creates a cause of action for assault in Georgia. *Capitol T.V. Service, Inc. v. Derrick,* 163 Ga. App. 65, 293 S.E.2d 724 (1982), *citing Quaker Life Ins. Co. v. Sutson,* 102 Ga. App. 53, 56, 115 S.E.2d 499 (1960).

From its analysis of these two tort remedies, the Court is confident that, under Georgia law, intentional infliction of emotional distress and simple assault are sufficiently similar in scope and character as to warrant the application of the intentional torts exception to the intentional infliction cause of action. Both torts require the plaintiff to demonstrate that the defendant acted with disregard for the rights of others and, in so doing, caused the plaintiff to suffer personal injury. Emotional or mental suffering, unaccompanied by physical injury, may be sufficient to invoke either remedy in certain situations. Furthermore, neither tort requires proof that the defendant intended to inflict harm which plaintiffs received, rather only that the defendant intended to commit the act which ultimately caused plaintiff's suffering.

For these reasons, the Court finds that 28 U.S.C. § 2680(h) is applicable in the instant case and that plain-

tiffs' claims of intentional emotional distress are completely barred by the Government's sovereign immunity.[4]

D. *Ingrid Metz's Claim of Privacy Intrusion*

Finally, plaintiffs have alleged that FLETC officials physically intruded and trespassed upon the seclusion, solitude and private affairs of Ingrid Metz and violated her right to privacy when they surreptitiously obtained access to plaintiffs' home residence. Plaintiffs' Amended

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[4] In reaching its decision, the Court is cognizant of recent cases which reject the view taken by this Court that § 2680(h) does not include the tort of intentional infliction of emotional distress. *See, e.g., Gross v. United States,* 676 F.2d 295, 303-04 (8th Cir. 1982); *Black v. Sheraton Corporation of America,* 564 F.2d 531, 539-40 (D.C.Cir 1977); *Crain v. Krehbiel,* 443 F.Supp. 292, 311 (N.D.Ca. 1977); *Avery v. United States,* 434 F.Supp. 937, 945 (D.Conn. 1977). The following cases, however, are in agreement with this Court's reasoning. *See, e.g., Bergman v. United States,* 567 F.Supp. 460, 463 (D.Colo. 1983); *United States v. Burke,* 548 F.Supp. 724, 729 (D.S.D. 1982); *Gross v. United States, supra,* at 305 (Gibson, J., dissenting).

While the Court is hesitant to "read exceptions into the [FTCA] beyond those provided by Congress," *Gross, supra,* at 304, it is essential that the Court "look beyond the literal meaning of the language to ascertain the real cause of complaint." *Hall v. United States,* 274 F.2d 69, 71 (10th Cir. 1959), *quoted with approval in United States v. Neustadt,* 366 U.S. 696, 703, 711, 81 S.Ct. 1294, 1298, 1302, 6 L.Ed.2d 614 (1961); *see also Johnson v. United States,* 547 F.2d 668, 691-92 (D.C.Cir. 1976); *Gaudet v. United States,* 517 F.2d 1034, 1035 (5th Cir. 1975); *Klein v. United States,* 268 F.2d 63, 64 (2d Cir. 1959). As dissenting Judge Gibson stated in *Gross v. United States:*

> Unless a court looks at the acts giving rise to a complaint, the applicability of the FTCA will depend on the ingenuity of counsel in drafting the complaint. Courts have held that the determination of whether an action is barred by § 2680(h) depends on the act or acts complained of, rather than the legal theory under which the action is brought.

Gross, supra, at 305.

Complaint, at 8. More specifically, plaintiffs assert that FLETC administrators "wrongfully and illegally used Father Carr and his assistance to gain entry into the Metz household." *Id.* Plaintiffs further assert that these officials, once in the Metz home, misrepresented to Ingrid Metz the status of her husband's mental well-being, informing her that George Metz had "threatened to kill himself, was homicidal, suicidal, armed and dangerous," and was to be arrested the next morning. *Id.* at 9. Plaintiffs contend that these actions amount to a tortious invasion of Ingrid Metz' privacy rights under Georgia law.

In reply, defendant moved to dismiss this claim pursuant to Fed.R.Civ.P 12(b)(6) for failure to state a claim upon which relief may be granted. Defendant argues that the Government agents entered the Metz home at the invitation of Mrs. Metz and then expressed to her their concerns regarding her husband's mental welfare. Defendant's Memorandum Brief, at 18. Furthermore, defendant asserts that the dissemination of information to an individual who might not want to hear it does not qualify as an invasion of privacy. *Id.*

Georgia has long recognized a cause of action for the invasion of privacy. *See Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905). Under this rubric, recovery is available for an intrusion into the plaintiff's private solitude or seclusion. *Cabaniss v. Hipsley,* 114 Ga. App. 367, 151 S.E.2d 496 (1966); *see Hines v. Columbus Bank & Trust Co., et al.*, 137 Ga. App. 368, 369, 223 S.E.2d 468 (1976). In the case at bar, plaintiffs specifically allege that Government agents intruded upon Mrs. Metz's private solitude when they entered her home with Father Carr.

The tort of invasion of private seclusion or solitude was created to protect the integrity and sanctity of physical areas a person naturally would consider private and off limits to uninvited, unwelcome and prying individuals. *Cummings v. Walsh Construction Company,* 561 F.Supp. 882, 884 (S.D.Ga. 1983). To recover under this tort, plaintiff must show that the defendant has intruded physically or violated plaintiff's private affairs, seclusion or solitude in a manner analogous to a trespass. *Id.; Peacock v. Retail Credit Company,* 302 F.Supp. 418, 422 (N.D.Ga. 1969).

The Court's review of precedent supports the conclusion that plaintiff suffered no such privacy intrusion. In every instance where a plaintiff was permitted to proceed with a claim for tortious invasion of privacy, the court specifically noted that the defendant intentionally and physically had intruded upon the plaintiff's solitude. *See, e.g., Ford Motor Co. v. Williams,* 108 Ga. App. 21, 232 S.E.2d 206, *rev'd on other grounds,* 219 Ga. 505, 34 S.E.2d 32 (1963) (defendant broke into plaintiff's house and removed goods which he wrongfully suspected plaintiff of having stolen); *Walker v. Whittle,* 83 Ga. App. 145, 64 S.E.2d 87 (1951) (wrongful arrest in plaintiff's house without a warrant); *Marcelli v. Teasley,* 72 Ga. App. 421, 33 S.E.2d 836 (1945) (property owner came upon premises occupied by plaintiff and threatened eviction in a loud, profane manner in the presence of others); *McDaniel v. Atlanta Coca-Cola Bottling Co.,* 60 Ga. App. 92, 2 S.E. 2d 810 (1939) (electronic eavesdropping equipment placed in plaintiff's hospital room to obtain information to destroy the validity of her claim of injury); *Young v. Western & Atlantic R.R.,* 39 Ga. App. 761, 148 S.E. 414 (1929) (unauthorized entry of home); *Byfield v. Chandler,* 33 Ga.

App. 275, 125 S.E. 905 (1924) (unauthorized entry of ship's stateroom); *Navcomb Hotel Co. v. Corbett,* 27 Ga. App. 365, 108 S.E. 309 (1921) (unauthorized entry of hotel room). The plaintiff in *Peacock* for instance, could not establish that defendant's inclusion of derogatory information in plaintiff's credit report constituted a physical invasion of plaintiff's solitude and the court granted defendant's motion for summary judgment. 302 F.Supp. at 424. In *American Credit Corp. v. United States Casualty Co.,* 49 F.R.D. 314, 321 (N.D. Ga. 1969), the Northern District of Georgia held that plaintiff's mild-mannered personal and telephone conversations with defendant regarding alleged dishonest and fraudulent acts committed by defendant did not amount to a physical invasion of defendant's right to privacy. *Cf. Pinkerton National Detective Agency v. Stevens,* 108 Ga. App. 159, 132 S.E.2d 119 (1963) (overt and prolonged trailing of plaintiff by defendant in such manner as to incite disgust and suspicion of neighbors violated plaintiff's solitude.

Recently, this District, per Judge Brown, reaffirmed the view that there can be no tortious privacy violation without a concomitant physical invasion into plaintiff's private solitude. *See Cummings, supra; Pierson v. News Group Publications, Inc.,* 549 F. Supp. 635 (S.D.Ga. 1982). In *Pierson,* the court held that the publication of two articles in a tabloid delineating plaintiff's military training did not physically violate plaintiff's personal affairs. 549 F.Supp. at 620; *see also Cummings, supra,* at 884.

The record in the case at bar indicates that defendants did not violate Mrs. Metz's private solitude by trespassing on her residence. In fact, as this Court found in *Metz v.*

McKinley, supra, at 687 n.3, Mrs. Metz admitted at deposition that she willingly agreed to talk to the officials and freely admitted them into her house along with Father Carr. *See* Deposition of Ingrid Metz, at 17 (filed March 7, 1983).[5] Nor has she convinced this Court that the information she received from the Government agents was offered in a manner which disturbed her private seclusion. While the news may not have been pleasant, it was information which she would have wanted to know.

For these reasons, Mrs. Metz's claim of privacy invasion will be dismissed.

CONCLUSION

To summarize, the Court has determined that the plaintiffs' claims against the Government cannot be maintained in light of *Feres v. United States, supra,* the intentional tort exception of the FTCA, 28 U.S.C. § 2680(h), and the law of privacy in Georgia.

Accordingly, the defendant's motion to dismiss the plaintiffs 'amended complaint, treated in part with respect to Ingrid Metz's claim for invasion of privacy as a motion for summary judgment, is hereby GRANTED. The Clerk of Court is directed to enter an appropriate judgment dismissing the action.

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[5] In the *Bivens* action previously brought by these same plaintiffs, the Court determined that Mrs. Metz's only "conceivable constitutional violation" stemming from the officials' visit to her home involved the Fourth Amendment. There, the Court held that Mrs. Metz's "assertion of a Fourth Amendment deprivation is devoid of merit." *Metz v. McKinley, supra,* at 687 n.3.

SO ORDERED, this 26th day of March, 1985.

/s/ Anthony A. Alaimo

CHIEF JUDGE,
UNITED STATES DISTRICT
COURT SOUTHERN
DISTRICT OF GEORGIA

28 USC § 1346.

(b) Subject to the provisions of chapter 171 of this title [28 USCS §§ 2671 et seq.], the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 USC § 2674.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

28 USC § 2680.

The provisions of this chapter and section 1346(b) of this title [28 USCS § 1346(b)] shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46 [46 USCS §§ 741 et seq.], relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administer-

ing the provisions of sections 1-31 of Title 50, Appendix [50 Appx USCS §§ 1 et seq.].

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) [Repealed]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided,* That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title [28 USCS § 1346(b)] shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(2)

No. 86-189

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

GEORGE F. METZ AND INGRID METZ, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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GEORGE F. METZ AND INGRID METZ, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners George and Ingrid Metz contend that the United States is liable under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, for alleged invasion of privacy and intentional infliction of emotional distress resulting from the arrest and detention of George Metz, a federal employee, at the request of his supervisors.[1]

1.a. George Metz was a driving instructor at the Federal Law Enforcement Training Center (FLETC) in Glynco, Georgia, until his discharge in November 1982.[2] Metz contends in his complaint that he was deliberately passed over

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[1]An issue similar to that presented here is raised in the petition for certiorari filed in *Johnson* v. *United States*, No. 86-114 (filed July 11, 1986), an FTCA action alleging that the Postal Service was negligent in employing and supervising a mailman who sexually assaulted a five-year-old girl.

[2]The FLETC is a unit of the Department of Treasury.

for promotions between 1977 and 1979 in favor of less qualified candidates. During that period, Metz complained to his fellow employees that FLETC administrators had engaged in misconduct. Metz alleges that, in response, his supervisors initiated a conspiracy against him. He claims that as a result of this alleged conspiracy, his job performance was downgraded from "outstanding" to "excellent," which prompted him to become even more uncomplimentary about his supervisors in conversations with other employees. In August 1982, Metz and his immediate supervisor, James Lanier, met to discuss Metz's continued complaints. David Epstein and Robert McCann, two other FLETC supervisors, were also present. Metz voiced his frustrations and concerns about his treatment by his supervisors. After this meeting, Metz, a Marine Corps reservist, left to report for active duty at Columbia, South Carolina. Pet. 4-5; Pet. App. A2-A3, A19-A20.

Metz' supervisors, concluding that Metz presented a threat to their personal safety, took the following steps: On the evening of August 3, 1982, David McKinley, then acting director of FLETC, and George Graves, another supervisor, contacted Metz' priest and asked him to accompany them to the Metz residence to help locate Metz and to speak with Metz' wife. Mrs. Metz told them that Metz was on his way to South Carolina. The next morning, Metz' supervisors obtained a warrant for the arrest of Metz on charges of "terroristic threats," a felony in Georgia, and informed the Marine Corps of the warrant. Marine Corps personnel, in response, detained Metz shortly after he arrived at the South Carolina military base and searched his car. Metz was later taken to a nearby Army mental hospital for psychiatric evaluation, where he was allegedly held for two days, after which he returned to his reservist duty. The FLETC later required Metz to undergo examination by a civilian psychiatrist, who pronounced him normal. The

FLETC nevertheless terminated his employment based on the threats that he allegedly made to his supervisors. Pet. App. A3-A4, A20-A22.

b. Metz contested his discharge through federal administrative proceedings, and was ultimately successful.[3] He and his wife also brought a *Bivens* action against various members of the FLETC, which was dismissed for failure to state a claim upon which relief could be granted.[4] Finally, they filed this FTCA action against the United States, seeking $18 million in damages, in the United States District Court for the Southern District of Georgia. They alleged that federal officials falsely arrested and imprisoned Mr. Metz and subjected him and his wife to invasion of privacy and intentional infliction of emotional distress. Pet. App. A4-A5.

The district court concluded (Pet. App. A40) that petitioners' claims against the United States "cannot be maintained in light of *Feres* v. *United States* [340 U.S. 135 (1950)[5]], the intentional tort exception of the FTCA, 28 U.S.C. 2680(h), and the law of privacy in Georgia." The court of appeals affirmed (Pet. App. A1-A17), holding that

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[3]The presiding official of the Merit Systems Protection Board (MSPB) Regional Office concluded that Metz' statements were non-threatening but inappropriate and imposed a mitigated penalty of 30-days' suspension. The MSPB reversed that decision, holding that Metz had threatened his supervisors. *Metz* v. *Dep't of the Treasury*, 23 M.S.P.R. 576 (1984). The Federal Circuit reversed the MSPB's determination, concluding that the evidence of threats was insufficient to warrant dismissal. *Metz* v. *Dep't of the Treasury*, 780 F.2d 1001 (1986).

[4]See *Metz* v. *McKinley*, 583 F. Supp. 683 (S.D. Ga. 1984), aff'd mem., 747 F.2d 709 (11th Cir. 1984).

[5]*Feres* held that the FTCA does not extend a remedy "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service" (340 U.S. at 146).

all of petitioners' claims arose out of intentional torts for which Congress has retained sovereign immunity.[6]

The court of appeals first concluded (Pet. App. A5-A7) that the FTCA's waiver of immunity for false arrest and false imprisonment by federal law enforcement officers (28 U.S.C. 2680(h)) did not apply because the FLETC and Treasury officials involved here are not law enforcement personnel.[7] The court specifically stated that "the provision permitting governmental liability on the basis of actions of law enforcement officers cannot be expanded to include governmental actors who procure law enforcement actions, but who are themselves not law enforcement officers" (Pet. App. A7, citing *Arnsberg* v. *United States*, 757 F.2d 971, 977-978 (9th Cir. 1985), cert. denied, No. 85-596, Feb. 24, 1986)).

The court of appeals next held (Pet. App. A8-A17) that petitioners' remaining claims, based on tort theories of invasion of privacy and intentional infliction of emotional distress, are non-actionable under Section 2680(h) of the FTCA because allegations of false arrest and slander—excepted causes of action under Section 2680(h)—are "essential" to establishing plaintiff's claims (Pet. App. A8-A17). The court agreed (Pet. App. A9-A10) with the reasoning of Chief Justice Burger in *United States* v. *Shearer*, No. 84-194 (June 27, 1985), slip op. 2-4, that the plain language

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[6]The court of appeals did not address the *Feres* issue because petitioners had abandoned any claim based on the culpability of the Marine Corps or its personnel (Pet. App. A5 n.1). The court of appeals also found it unnecessary to decide the state law questions, stating that the district court should have referred to traditional and commonly understood tort definitions, rather than to the law of Georgia (*id.* at A14 n.8).

[7]The district court had held that the FLETC and Treasury Department officials were not themselves "investigative or other law enforcement officers," and petitioners did not argue to the contrary on appeal (Pet. App. A7 n.2).

of Section 2680(h) preserves sovereign immunity in the case of actions "arising out of" certain intentional torts (such as false arrest and slander) and therefore prohibits claimants from clothing actions for those torts in the garb of other potentially actionable torts.[8] The court observed (Pet. App. A10-A11) that this Court's decision in *Kosak* v. *United States*, 465 U.S. 848 (1984), indicates that the phrase "arising out of" in the FTCA should be broadly construed. Most helpful, the court of appeals concluded (Pet. App. A11), was this Court's decision in *Block* v. *Neal*, 460 U.S. 289 (1983). In that case the Court rejected the government's contention that a claim was barred by the misrepresentation exception of Section 2680(h) since in that case "the misstatements are not essential to plaintiff's negligence claim" (460 U.S. at 297). The court of appeals concluded from these three decisions that "a cause of action which is distinct from one of those excepted under 2680(h) will nevertheless be deemed to 'arise out of' an excepted cause of action when the underlying governmental conduct which constitutes an excepted cause of action is 'essential' to plaintiff's claim" (Pet. App. A12).

Applying this test, the court of appeals analyzed plaintiffs' invasion of privacy and intentional infliction of emotional distress claims in three groups. First, it noted that "the government's actions that constitute a claim for false arrest are essential to Mr. Metz's claims for intentional infliction of emotional distress and intrusion into seclusion. There is no other government conduct upon which such claims can rest." Pet. App. A14. Second, as to Mr. Metz'

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[8]Justices White, Rehnquist, and O'Connor joined in Chief Justice Burger's opinion. Justice Brennan, joined by Justices Blackmun and Stevens, declined to concur in the portion of the opinion addressing 28 U.S.C. 2680(h) but concurred in the judgment. Justice Marshall concurred in the judgment and Justice Powell did not participate in the decision of the case.

false light claim and Mrs. Metz' intentional infliction of emotional distress claim, it concluded that the wrongs complained of in both instances were governmental statements constituting slander, which is among the torts enumerated in Section 2680(h) (Pet. App. A15). Finally, it reached the same conclusion with regard to Mrs. Metz' allegation that her seclusion was violated when the defendants came to her house and secured admission by making false assertions about her husband (Pet. App. A16-A17).

2. Petitioners broadly argue (Pet. 9-11) that the FTCA authorizes tort actions against the United States for invasion of privacy and intentional infliction of mental distress. But the actual (and much more narrow) question presented by this case is whether the FTCA permits such actions when they "arise out of" intentional torts specified in Section 2680(h). The court of appeals correctly recognized that essential to the actions petitioners allege are claims for false arrest and slander, barred by Section 2680(h), which petitioners have simply recast as claims for invasion of privacy and intentional infliction of emotional distress. And the court properly concluded that Section 2680(h) should bar those claims. That decision does not warrant further review.

a. The FTCA generally "does not apply" to various intentional torts, including "[a]ny claim arising out of * * * false imprisonment, false arrest * * * [or] slander" (28 U.S.C. 2680(h)).[9] Petitioners' claims here "arise out of" those specifically listed torts and are therefore barred. Their claims rest wholly on allegations that federal officials made false statements concerning Mr. Metz and subjected him to false arrest. As the court of appeals explained (Pet. App. A14, A15), claims for slander and false arrest are essential

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[9]The FTCA does permit false imprisonment and false arrest claims against law enforcement officers. See 28 U.S.C. 2680(h).

to petitioner's claims because "[t]here is no other government action upon which these claims could rest."

This Court addressed an analogous situation in *Shearer*. An FTCA plaintiff attempted to characterize a serviceman's battery of another serviceman as an instance of negligent government supervision. Chief Justice Burger, writing for a plurality of four Justices, explained the controlling principle (slip op. 3, (emphasis in original)): "Section 2680(h) does not merely bar claims *for* assault or battery; in sweeping language it excludes any claim *arising out of* assault or battery. We read this provision to cover claims like respondent's that sound in negligence but stem from a battery committed by a Government employee." We believe that the reasoning of the plurality is persuasive and plainly supports the court of appeals' decision in this case. See also *Kosak*, 465 U.S. at 853-854. The petitioners here, like the respondent in *Shearer*, have simply utilized a "semantical recasting of events" (slip op. 2) to avoid Section 2680(h)'s limitations. If petitioners' approach were to prevail, Section 2680's limitations could *always* be circumvented in any case based on false arrest or slander by recharacterizing the claims as claims for invasion of privacy or intentional infliction of emotional distress.

b. Petitioners cite (Pet. 3, 9) two court of appeals cases, *Gross* v. *United States*, 676 F.2d 295, 303-304 (8th Cir. 1982), and *Black* v. *Sheraton Corp.*, 564 F.2d 531, 539-541 (D.C. Cir. 1977), as conflicting with the decision below.[10]

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[10]Petitioners also cite (Pet. 9) *Birnbaum* v. *United States*, 588 F.2d 319 (2d Cir. 1978), as conflicting with the decision here. However, while the court in that case held that an invasion of privacy claim was not barred by Section 2680(h) (588 F.2d at 328), the court did not explain the basis for the government's contention that Section 2680(h) barred the claim. Moreover, we do not see how the underlying government conduct—covertly opening mail sent to and received from the Soviet Union—could be said to constitute a claim listed in Section 2680(h) from which the plaintiff's invasion of privacy claim arose. Accordingly, there is no conflict between the decision here and the decision in *Birnbaum*.

Those cases were decided before this Court's recent decisions illuminating the meaning of Section 2680(h). As the court of appeals noted (Pet. App. A9 n.3), neither case squarely discussed the significance of Section 2680(h)'s "arising out of" language. Furthermore, it is unclear from the court's discussion in each case whether allegations constituting excepted causes of action in Section 2680(h) are, as here, essential to the pursuit of the claims in dispute. The governmental conduct underlying the claim in *Black*—bugging the plaintiff's hotel room (564 F.2d at 534)—does not appear to constitute a claim barred by Section 2680(h). Thus the District of Columbia Circuit's decision in that case does not appear to be in conflict with the decision here.[11] It is not at all clear whether the underlying governmental conduct in *Gross*—denial of permission to participate in a feed grain program—constituted a claim barred by Section 2680(h), although the dissent in that case thought that the plaintiff would be required to show "an invasion of rights closely analogous to those invasions of rights listed in Section 2680(h)" (676 F.2d at 305) to prevail on his infliction of emotional distress claim. Since that case was decided before this Court's decisions in *Shearer*, *Kosak*, and *Block* v. *Neal*, the court did not consider whether the underlying governmental conduct out of which the plaintiff's action arose actually constituted a claim barred by Section 2680(h). Petitioner does not suggest that the underlying governmental conduct in *Gross* constituted a claim barred by Section 2680(h), instead alleging a conflict simply on the basis that the court permitted the plaintiff to go forward

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[11]The District of Columbia Circuit recently held in *Art Metal-U.S.A., Inc.* v. *United States*, 753 F.2d 1151, 1153-1156 (1985), that claims alleging interference with prospective business advantage and injurious falsehood arose out of wrongful interference with contract rights and libel or slander and hence were barred by Section 2680(h), confirming that the approach taken by that circuit is consistent with the approach taken here.

with an intentional infliction of emotional distress claim in *Gross* while the court held that such a claim was barred under the facts of this case. Under these circumstances, there is no clear conflict warranting this Court's review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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